

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 31-89:

FLORENCE-CARLTON, CLASSIFIED
ASSOCIATION,

Complainant,

- vs -

FLORENCE-CARLTON SCHOOL
DISTRICT,

Defendant.

FINAL ORDER

The Findings of Fact; Conclusions of Law; and Recommended Order were issued by Hearing Examiner John Andrew on May 23, 1991.

Exceptions to the Findings of Fact; Conclusions of Law; and Recommended Order were filed by Emilie Loring, Attorney for Complainant, on June 11, 1991.

Oral argument was scheduled before the Board of Personnel Appeals on Friday, August 2, 1991.

After reviewing the record, considering the briefs and oral arguments, the Board orders as follows:

1. IT IS ORDERED that the Exceptions to the Findings of Fact; Conclusions of Law; and Recommended Order are hereby denied.

2. IT IS ORDERED that this Board therefore adopts the Findings of Fact; Conclusions of Law; and Recommended Order of Hearing Examiner John Andrew as the Final Order of this Board.

DATED this 14th day of August, 1991.

BOARD OF PERSONNEL APPEALS

BY [Signature]
ROBERT A. POORE, CHAIRMAN
BOARD OF PERSONNEL APPEALS

CERTIFICATE OF MAILING

I, Jennifer Jacobson, do certify that a true and correct copy of this document was mailed to the following on the 14th day of August, 1991:

Dr. Ernest Jean
Superintendent
Florence-Carlton Public Schools
5540 Old Highway 93
Florence, MT 59833

Don E. Klepper
The Klepper Company
P.O. Box 4152
Missoula, MT 59806

Emilie Loring
HILLEY & LORING
500 Daly Avenue
Missoula, MT 59801

[Signature]
Jennifer Jacobson
Administrative Secretary
Board of Personnel Appeals

NOTICE: You are entitled to Judicial Review of this Order. Judicial Review may be obtained by filing a petition for Judicial Review with the District Court no later than thirty (30) days from service of this Order. Judicial Review is pursuant to the provisions of Section 2-4-701, et seq., MCA.

STATE OF MONTANA
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IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 31-89:

FLORENCE-CARLTON, CLASSIFIED
ASSOCIATION,

Complainant,

vs.

FLORENCE-CARLTON SCHOOL
DISTRICT,

Defendant.

FINDINGS OF FACT;
CONCLUSIONS OF LAW;
RECOMMENDED ORDER

I. INTRODUCTION

The above matter comes on as a result of an unfair labor practice filed by the Florence-Carlton Classified Association on June 26, 1989. The matter was remanded by the Board of Personnel Appeals so that each party could "fully present all relevant evidence including the matters pertinent to the actions of prior school boards in approving or disapproving these payments" [holidays]. An evidentiary hearing as directed by the Board was held and the matter submitted on January 18, 1991.

II. ISSUE (As defined by the parties)

Whether the Defendant's failure either to give classified employees the Mondays following Christmas and New Year's as paid holidays or to pay employees for Christmas and New Year's in light of the history of giving the following Mondays off with pay when holidays fell on Sundays in 1982, 1983 and 1984 is a unilateral change in a mandatory subject of bargaining and a

1 refusal to bargain in good faith.

2 III. STIPULATED FACTS (#1 through #6 Restipulated)

3 1. The Florence-Carlton Classified Association
4 (Association) represents the classified employees of Defendant
5 school district.

6 2. The Association was certified as the exclusive
7 representative in the fall of 1986. The parties negotiated in
8 1987 and 1988 seeking to reach agreement on an initial collective
9 bargaining contract. The initial contract was entered into on
10 February 17, 1989.

11 3. Christmas 1988 and New Year's Day 1989 fell on Sundays.
12 The classified employees did not work, nor were they paid for the
13 two holidays. They were not given the following Mondays off nor
14 were they paid more than straight time for the following Mondays.

15 4. The last time Christmas and New Year's Day fell on
16 Sundays was in 1983 (Christmas) and 1984 (New Year's Day). The
17 classified employees received the following Mondays as holidays
18 and were paid for the Monday holidays.

19 5. In 1982, July 4th fell on a Sunday. Year round
20 classified employees scheduled to work in July were given Monday,
21 July 5, 1982 as a holiday and were paid for that holiday.

22 6. The collective bargaining contract solved the problem
23 for the future. Complainant's requested remedy is straight time
24 pay for Christmas 1988 and New Year's Day 1989 for all classified
25 employees represented by the Association.

1 7. From 1979 through 1989 the law pertaining to holidays
2 for school districts, 20-1-305 MCA, has provided the following
3 holidays and language:

4 New Year's Day (January 1)
5 Memorial Day (last Monday in May)
6 Independence Day (July 4)
7 Labor Day (first Monday in September)
8 Thanksgiving Day (fourth Thursday in November)
9 Christmas Day (December 25)

10 State and National Election Days when the school
11 building is used as a polling place and the conduct of
12 school would interfere with the election process at the
13 polling place.

14 When these holidays fall on Saturday or Sunday the
15 preceding Friday or the succeeding Monday shall not be a
16 school holiday. (Emphasis added.)

17 8. Superintendent Dr. Ernie Jean testified that Board
18 Policy 623, Defendant's Exhibit #2, dealing with holidays was
19 modified to take effect July 1, 1983, and that as of that date
20 the Board affirmed its decision to follow the provisions of 20-1-
21 305 MCA.

22 9. The time cards submitted as Defendant's Exhibits #6 and
23 #7 reflect that for the period of time they cover, parts of 1986
24 and 1987, the District was consistent in applying 20-1-305 to
25 holiday pay.

1 10. The June 21, 1983, minutes of the Board state:

2 "Classified personnel will be evaluated once a year in
3 writing. Holidays will be prescribed by state law. If
4 holiday is on Sunday, the following Monday will be allowed
5 but if holiday is on Saturday, Friday is not allowed."

6 This is a variance from 20-1-305 MCA pertaining to holidays
7 falling on Sunday and is permissible under the law.

1 11. On December 7, 1983, the non-certified staff wrote to
2 the Board and requested the following:

3 "The noncertified personnel at Florence-Carlton School
4 respectively request that you grant them the Monday after
5 Christmas and the Monday after New Year's Day as holidays
6 rather than days that vacation leave be used by the
7 employees wanting that time off. *(paid holidays)."

8 This indicates an understanding by the staff, garnered
9 through whatever source, that holidays falling on Sunday,
10 including Christmas and New Years Day were not paid holidays.

11 In response to this request the Board minutes of December
12 13, 1983, read:

13 "A request from the non-certified staff for paid holidays on
14 December 26 and January 2 was declared moot as the day after
15 a Sunday holiday is a paid holiday." (Emphasis added.)

16 Again, this is a variation from the statute.

17 12. On February 3, 1984, the non-certified staff wrote to
18 the Board regarding consideration of various terms and conditions
19 of employment. The relevant part of the request asks to
20 "reinstate the holiday allowance as listed below". The request
21 then goes on to refer to "legal holidays as listed in section
22 75.7406 RCM". 75.7406 RCM is now codified as 20-1-305 MCA, the
23 section that provides that the Monday following holidays that
24 fall on Sunday is not a holiday. Knowingly or not, the employees
25 were asking to not be paid for holidays falling on Sunday.

13. The non-certified staff wrote another list of items for
the Board to consider on April 29, 1985. That request asks that
the Board consider the "legal holidays as listed in 1-1-216."

1 This statute provides legal holidays for the state of Montana
2 including Monday as a holiday if the recognized holiday falls on
3 a Sunday. By referencing this statute the employees seemingly
4 were now requesting pay for holidays falling on Sunday.
5

6 IV. DISCUSSION

7 This matter was remanded by the BOPA with specific
8 instructions to consider all prior Board action relating to
9 payment for school holidays. In doing so, this necessitated the
10 introduction of evidence not previously considered, or for that
11 matter not offered. In some instances that information was
12 beneficial. In other instances that information just compounds
13 the confusion surrounding this matter. There are documents that
14 bear no date; documents that have missing material; and documents
15 that refer to "law" without referencing specific statutes.
16

17 The question in this case is whether a unilateral change has
18 been made in a mandatory subject of bargaining. It is agreed
19 that holidays are a mandatory subject of bargaining. To
20 determine whether there has been a change it must first be
21 determined how holidays were treated at the time the change, if
22 it was a change, occurred. The policy, or rule in effect as to
23 holiday payment is the basic fact that must be determined.
24

25 The District contends that 20-1-305 MCA which does not allow
for Monday as a holiday if the recognized holiday falls on Sunday
is controlling. The Board further contends that its actions, the

1 actions of the non-certified staff and the policy manual reflect
2 a reliance on and application of 20-1-305 MCA. The District
3 further contends that the variation from this statute which
4 occurred in 1983/84 was a one time Board action and that the
5 Board then returned to its written policy.

6 The Association contends that the evidence submitted on
7 remand should not alter the original decision and that there was
8 never any discussion between the district and the non-certified
9 staff about not observing Christmas and New Year's Day as paid
10 holidays regardless of what day they occurred.

11 At the onset it is noted that there was no bargaining
12 representative negotiating for the non-certified staff until
13 after the holidays in question occurred. However, it is correct
14 to say that on a yearly basis the non-certified staff offered
15 "proposals" on various issues, including holidays, which were at
16 least reviewed by the Board. Since there was no testimony
17 offered by the non-certified staff, or by any of the Board
18 members as to what these "proposals" meant the paper trail is the
19 only evidence as to what the status of holidays was at the time
20 the first collective bargaining agreement was reached. Based on
21 that paper trail, the most telling documents are the time cards
22 and the letter from the non-certified staff requesting
23 reinstatement of holidays and referencing section 75-7406 RCM,
24 the codified statute relied upon by the Board in its defense.
25 The fact that this reference occurred in 1984 is indicative

1 either of a mistake on the part of the non-certified staff in
2 referencing that particular statute or an intention to go along
3 with the Board policy and obtain the other items listed on page
4 three of Defendant's Exhibit #5. With the available facts the
5 mistake scenario is conjecture. The second scenario is possible
6 when viewed in the context of the time cards and the other paper
7 trail. The status quo at the time the first collectively
8 bargained contract was negotiated did not provide payment for
9 holidays falling on Sunday. The Board did not make a unilateral
10 change, but rather followed the status quo.

11
12 V. CONCLUSIONS OF LAW

13 The evidence does not demonstrate that the Defendant
14 violated 39-31-401(1) and 39-31-401(5) MCA by making a unilateral
15 change in a mandatory subject of bargaining during the course of
16 negotiations.

17 VI. RECOMMENDED ORDER

18 The relief requested by the Complainant is denied and it is
19 recommended that this matter be dismissed.

20 Dated this 23rd day of May, 1991.

21
22 BOARD OF PERSONNEL APPEALS

23
24 By:  _____

25 JOHN ANDREW
Hearing Examiner

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 31-89

FLORENCE-CARLTON, CLASSIFIED ASSOCIATION,	}	
	}	
Complainant,	}	FINDINGS OF FACT;
	}	CONCLUSIONS OF LAW;
vs.	}	ORDER
	}	
FLORENCE-CARLTON SCHOOL DISTRICT,	}	
	}	
Defendant.	}	

I. INTRODUCTION

The above matter comes on as a result of an unfair labor practice filed by the Florence-Carlton Classified Association on June 26, 1989. Pursuant to agreement between the parties an evidentiary hearing was waived and stipulated facts were submitted to the hearing examiner. Briefs have been filed. No request for oral argument was made. The matter was submitted on December 15, 1989.

II. ISSUE (As defined by the parties)

Whether the Defendant's failure either to give classified employees the Mondays following Christmas and New Year's as paid holidays or to pay employees for Christmas and New Year's in light of the history of giving the following Mondays off with pay when holidays fell on Sundays in 1982, 1983 and 1984 is a unilateral change in a mandatory subject of bargaining and a refusal to bargain in good faith.

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III. STIPULATED FACTS

1. The Florence-Carlton Classified Association (Association) represents the classified employees of Defendant school district.

2. The Association was certified as the exclusive representative in the fall of 1986. The parties negotiated in 1987 and 1988 seeking to reach agreement on an initial collective bargaining contract. The initial contract was entered into on February 17, 1989.

3. Christmas 1988 and New Year's Day 1989 fell on Sundays. The classified employees did not work, nor were they paid for the two holidays. They were not given the following Mondays off nor were they paid more than straight time for the following Mondays.

4. The last time Christmas and New Year's Day fell on Sundays was in 1983 (Christmas) and 1984 (New Year's Day). The classified employees received the following Mondays as holidays and were paid for the Monday holidays.

5. In 1982, July 4th fell on a Sunday. Year round classified employees scheduled to work in July were given Monday, July 5, 1982 as a holiday and were paid for that holiday.

6. The collective bargaining contract solved the problem for the future. Complainant's requested remedy is straight time pay for Christmas 1988 and New Year's Day 1989 for all classified employees represented by the Association.

1 IV. DISCUSSION

2 This matter was to be submitted by stipulation. That was
3 done with the Complainant signing the stipulation on September
4 12, 1989 and the Defendant signing the stipulation on October 31,
5 1989.

6 In its initial brief the Defendant has attempted to submit
7 "evidence" that was never stipulated. In response the
8 Complainant has countered with an affidavit that was never
9 stipulated. When the stipulation was signed it was a done deal.
10 Absent an agreement to do so, the additional or new evidence will
11 not be considered.

12 The question in this particular case is whether a
13 unilateral change has been made in a mandatory subject of
14 bargaining. Under NLRB precedent holidays are a mandatory
15 subject of bargaining Singer Mfg. Co. v. NLRB, 313 U.S. 595,
16 (1941), 8 LRRM 740. Such precedent is persuasive if not
17 dispositive of similar questions before the Board of Personnel
18 Appeals, State ex rel. Board of Personnel Appeals vs. District
19 Court., 183 Montana 223, 598 P.2d 1117, 103 LRRM 2297; Teamster
20 Local No. 45 v. State ex rel. Board of Personnel Appeals, 1985
21 Montana 272, 635 P.2d 1310, 110 LRRM 2012; City of Great Falls v.
22 Young (III), 683 P.2d 185, 119 LRRM 2682, 21 Montana 13.
23 Holidays are a mandatory subject of bargaining. Also see 18 AG
24 Opinions #38, 1980 and Florence-Carlton v. School District No.
25 15-6, ULP 5-77 where the Board of Personnel Appeals recognized

1 that Montana statutes dealing with public employees are concerned
2 with wages, hours and working conditions, mandatory subjects.
3 Although the Association employees are not covered by the
4 statutes on holidays they are public employees. If holidays are
5 a mandatory subject for public employees covered by holiday
6 statutes there is no reason to believe that holidays would not be
7 a mandatory subject for all public employees.

8 A unilateral change in a mandatory subject of bargaining is
9 a per se refusal to bargain and a violation of the Act, NLRB v.
10 Katz, 369 U.S. 736. The law found in Katz has also been followed
11 by the Board of Personnel Appeals. The Court in Katz found
12 three exceptions to the doctrine that unilateral action by an
13 employer was a per se violation of the Act. The exceptions to
14 the doctrine were impasse, waiver, and necessity, none of which
15 exist in this case.

16 From the facts it is clear that in the past (1983 and 1984)
17 the classified employees had received a holiday if Christmas or
18 New Years fell on a Sunday. They also received a Monday off in
19 1982 when the 4th of July fell on a Sunday. This practice would
20 certainly give rise to an expectation on the part of the
21 employees that the same would happen for Christmas and New Years
22 in 1988 and 1989 until such time as any doubt about this
23 practice, if there were any doubt, had been erased. From the
24 stipulated facts this occurred with agreement on the first
25 contract - February 17, 1989. Doubt, if there were any, was not

1 erased prior to this time and the District had an obligation to
2 maintain the status quo which was payment for the holidays.
3 To do otherwise was a unilateral change in a mandatory subject of
4 bargaining.

5 V. CONCLUSIONS OF LAW

6 1. The Defendant violated 39-3-401(1) and 39-3-401(5) MCA
7 by making a unilateral change in a mandatory subject of
8 bargaining during the course of negotiations.

9 VI. RECOMMENDED ORDER

10 The relief requested by the Complainant is granted. The
11 Florence-Carlton School District is ordered to compensate those
12 employees employed by the Florence-Carlton School District on the
13 dates that the subject holidays occurred.

14 Dated this 12/2 day of April, 1990.

15 BOARD OF PERSONNEL APPEALS

16
17
18 By: 

19 JOHN ANDREW
20 Hearing Examiner

21 NOTICE: Exceptions to these Findings of Fact, Conclusions of Law
22 and Recommended Order may be filed within twenty days of service.
23 If no exceptions are filed the Recommended Order will become the
24 Order of the Board of Personnel Appeals.
25